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12 FEDERAL INSURANCE COMPANY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

15 CROWLEY MARITIME
16 CORPORATION,

17 Plaintiff,

18 vs.

19 FEDERAL INSURANCE COMPANY;
20 TWIN CITY FIRE INSURANCE
COMPANY; and RLI INSURANCE
COMPANY,

21 Defendants.

Case No. CV 08 0830 SI

**FEDERAL INSURANCE COMPANY'S
OPPOSITION TO PLAINTIFF'S MOTION
TO STRIKE**

Complaint Filed: 01/07/08
Hearing Date: 08/22/08

23 Plaintiff Crowley Maritime Corp.'s ("Crowley") Motion to Strike should be rejected
24 because Federal Insurance Company's ("Federal") submission of the Affidavit Declaration of Henry
25 Nicholls ("the Nicholls Declaration") is entirely proper. Crowley's inflammatory assertions to the
26 contrary are baseless for at least two reasons.

1 First, the Nicholls Declaration directly responded to the inaccurate and misleading
 2 statements that Crowley offered in Opposition to the Motion to Disqualify. *Compare* Shively Decl.
 3 ¶¶3-8 (purporting to describe communications with Federal, including the April 5, 2007
 4 conversation) and Abramczyk Decl. ¶8 (asserting that Federal was not actively involved in Franklin
 5 Fund Action) *with* the Nicholls Decl. ¶¶3-9 (describing Federal’s communications with Crowley,
 6 including the April 5, 2007 conversation, and Federal’s involvement in the Franklin Fund Action).
 7 Evidence offered on reply is not “new” if it responds to the nonmovant’s “factual” assertions in
 8 opposition. *Terrell v. Contra Costa County*, 232 Fed. Appx. 626, 629 n.2, 2007 WL 1119331, *2
 9 (9th Cir. Apr. 16, 2007). Federal was entitled to correct the misleading statements that Crowley
 10 offered in Opposition, and Crowley is not entitled to file a supplemental brief. *Compare id. with*
 11 *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (nonmovant entitled to file a supplemental
 12 brief if “new” evidence offered on reply); MOORE’S FED. PRACTICE § 6.08[3] (2008) (declarations
 13 may be offered in support of reply brief); CIV. LOCAL R. 7-3(c) (same).

14 Second, as Federal explained in its Reply Brief, the Nicholls Declaration should have been
 15 unnecessary but for Crowley’s election in its Opposition to ignore that a factual dispute regarding
 16 Mr. Shively’s April 5, 2007 conversation with Mr. Nicholls is apparent on the face of the pleadings.
 17 *See* Federal’s Reply at 2-3 (citing Am. Compl. ¶¶8, 12, 13; Federal Answer ¶¶8, 12, 13). Crowley
 18 also ignores that Crowley, not Federal, put the April 5, 2007 conversation at issue by relying in
 19 significant part on it in its Complaint. Am. Compl. ¶¶8, 12, 13^{1/} Federal did not need to offer a
 20 declaration to establish that the April 5, 2007 conversation is at issue or is disputed. But when
 21 Crowley elected to ignore the pleadings and submit no less than five declarations with its
 22 Opposition, Federal was entitled to and did respond to the assertions that are even arguably relevant
 23 to Crowley’s arguments in Opposition.

24
 25 ^{1/} If Crowley believes the April 5 conversation “is not at the heart of this case” (Mot. to Strike at
 26 2:13-15), Crowley should state whether it is willing to strike its allegations relying on this
 27 conversation. Otherwise, Crowley is disingenuous in asserting that the conversation is irrelevant,
 28 even if Crowley is right for the wrong reasons. *See* Joinder at 3:20-23 and Federal Reply at 3:19 –
 4:7 (April 5, 2007 conversation has no bearing because Crowley already had breached its duties
 under the plain language of the Policy’s consent provisions).

1 Accordingly, Federal respectfully requests that the Court reject Crowley's Objection and
2 Motion to Strike.

3 Respectfully submitted,

4 Dated: August 20, 2008

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